THE BLOGS

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# Why Israeli Settlements Are Not a Violation of International Law

Critics of Israel's policy to allow its citizens to live in the regions of Judea and Samaria have two separate arguments for why the settlements are illegitimate. One is a legal argument, the other is political. In this article, I will explain why Israeli homes in the area are in fact legal under international law. In my next installment, I will address the political argument.

Recently there was a big noise made over a U.N. Security Council resolution that declared Israeli homes, built in the region of Judea and Samaria, a "flagrant violation of international law." The resolution does not break any new ground, as far as the international community is concerned, because President Jimmy Carter allowed the Security Council to pass a resolution that stated Israeli homes built in Judea/Samaria have "no legal validity."

Both of these resolutions, although they make a bold and stark statement about the legality of the so called "settlements", are merely political statements. As I explained at the bottom of a previous article, these resolutions are non-binding

under international law. Furthermore, these resolutions are not consistent with objective legal analysis of the subject by world experts on international law.

In order to find Israel's settlements to be a violation of international law, first, Israel must be considered an occupier of foreign territory. Yet, Israel's legal claim to the territory in question was recognized by the international community on several occasions. First, the land on both sides of the river Jordan were recognized as part of the Jewish National Home by the 1920 San Remo Conference. This was endorsed by the League of Nations (predecessor to the United Nations) in the 1922 League of Nations Mandate to Britain, and affirmed by article 80 of the United Nations charter in 1945. When Israel's leaders declared sovereignty in all territory relinquished by England on May 15, 1948 (including the territory that anti-Israel people call the "West Bank") it was recognized as the State of Israel by the General Assembly and Security Council by May1949.

Jordan invaded (along with four other Arab states) and conquered this specific territory in 1949, annexed it in 1950, and gave it a new name: "West Bank" (of the river Jordan). Only two countries in the entire world recognized Jordan's annexation (England and Pakistan) and not a single Arab country recognized this annexation.

Furthermore, article 2 of the UN charter forbids the acquisition of territory through war. Thus, Jordan's acquisition and annexation of the territory was illegal under international law.

In 1967, Jordan again initiated war against Israel (along with two other Arab states) but Jordan was pushed out of the territory (back to Jordan's recognized boundaries on the east bank of the Jordan river) by Israel. This re-acquisition of the territory by Israel was legal because article 51 of the U.N. charter permits a nation to defend itself from attack. It is understood that national self-defense often necessitates control of any territory from which the initial aggression was launched.

If the territory would have been recognized as within the borders of the State of Jordan by either Israel or the international community between 1949 and 1967, then it would have meant Israel's return to the territory was an occupation, regardless of previous title. But Jordan's annexation was not recognized by the international community, nor did the Jordan-Israel ceasefire agreement represent acquiescence to new borders by either side:

> *"No provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations." GENERAL ARMISTICE AGREEMENT BETWEEN ISRAEL AND JORDAN – APRIL 3, 1949."*

Given the fact that Israel had legal title to the territory that was recognized by the international community and Israel's final control of the territory was a result of self-defense rather than aggression, while Jordan's control of the territory was never recognized as legitimate by the international community, common sense shows that Israel merely won back territory that legitimately belonged to it in the first place.

This is a strong legal argument for why Israel has superior title to the territory, in a legal chain that was never legitimately broken, therefore Israel can't be an occupier on territory that belongs to it in the first place.

This position is shared by Judge Schwebel, former President of the International Court of Justice, in his book on the subject "What Weight to Conquest? Aggression, Compliance, and Development" pg. 521-526.

For a fuller explanation on why Israel can't be an occupier, see my previous article on the subject.

But, for the sake of argument, let us play devil's advocate and assume Israel had no legal title to the territory in 1967. In that case, would Israel's settlements be a

violation of international law?

The answer is no, here is why:

The Fourth Geneva Convention provides the international law as relates to occupied territory, and is the basis of any legal argument against Israel on the subject of Israeli settlements. Therefore, in order to make the conclusion that Israel's settlements are illegal under international law, one must be able to apply this convention to Israel's presence in the area. And then, one must show that Israel is in violation of one of the provisions of the convention.

In order for a territory to be recognized as occupied by the Fourth Geneva Convention, a territory must have changed hands in a conflict in which one country takes control of foreign territory. In Israel's case, the only other country that controlled the territory in question was Jordan. Yet, Jordan relinquished all claims to the territory in 1988 and recognized the territory as part of Israel in a peace treaty signed in 1994.

Thus, even if Israel's capture of the territory in 1967 is considered an occupation, the fact that Jordan later relinquished all its claims and then recognized the territory as part of the State of Israel means any such occupation is long over.

But for argument's sake let us play devil's advocate and assume Israel is still an occupier to this day, as some might argue, despite the lack of an international conflict. Then, are the settlements illegal?

The answer is still no, here is why:

The convention only applies to States that are a party to the convention itself. Thus, either the occupier or the occupied must be a signatory to the convention in order for it to apply. Since the Arab residents of the West bank are not residents of a state that is bound by the Convention, and Israel is not a signatory either, therefore the Fourth Geneva Convention does not apply to this conflict.

This position is shared by Professor Julius Stone, one of the 20th century's leading authorities on international law, "Israel and Palestine, Assault on the Law of Nations" discourse 2, pg. 177.

This was also the position of a French Court of Appeals which stated: neither the Palestinian Authority nor Israel is a party to the Fourth Geneva Convention and therefore the convention does not apply to them. For the full text in the original French, click here. For a google translated text, click here.

But let us once again play devil's advocate and put this technical, yet decisive, issue aside. Let us imagine the Fourth Geneva Convention applies despite the fact that neither Israel nor the Palestinian Authority is a party to the convention. Then, are the settlements illegal?

In that case, the answer is still no, here is why:

Those who claim the settlements are illegal point to Article 49 of the convention, which states that to be an illegal occupier the occupying power must do one of two things:

1. Forcibly transfer the population under occupation to outside the occupation zone, either inside the controlling country or to another country.

2. Transfer the population of the occupier from its own country to the occupied zone.

No one among Israel's critics is claiming that Israel is absorbing the Arab-Palestinian population into Israel proper, nor is anyone claiming Israel is deporting entire populations from the territory to somewhere else. So the first provision does not apply.

As for the second provision, it requires a wild stretch of the imagination to describe the voluntary choice made by free acting persons to migrate to the area

as “persons being deported or transferred by their government”. Especially when one considers the authoritative, and official, commentary to article 49 states that this provision was:

> *Intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.””*

There is simply no legitimate comparison between Israeli citizens’ vote, through their wallet and their feet, and the millions of Germans and others who were actively required by their own government to move from their country into newly occupied zones elsewhere.

This position is shared by various international law scholars such as Professor Eugene Rostow (former Under Secretary of State, former dean of Yale Law School, and author of Security Council Resolution 242) who wrote:

> *[T]he Convention prohibits many of the inhumane practices of the Nazis and the Soviet Union during and before the Second World War – the mass transfer of people into and out of occupied territories for purposes of extermination, slave labor or colonization, for example….The Jewish settlers in the West Bank are most emphatically volunteers. They have not been “deported” or “transferred” to the area by the Government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent.” American Journal of International Law, Vol. 84, 1990, p. 719.”*

And Professor Julius Stone, one of the 20th century’s leading international law experts, who wrote:

> *Irony would…be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories judenrein, has now come to mean that…the West Bank…must be made judenrein and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants. Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6).” “Israel and Palestine, Assault on the Law of Nations” discourse 2, pg. 179-181.”*

But, let us play devil’s advocate, and assume the Israeli government’s allowance of its citizens to live and build within its borders is a violation of article 49. Then, are the settlements illegal under international law?

The answer is still no, here is why:

Any question of legal validity under international law should be resolved by the fact the Palestinian-Authority, under Yasser Arafat, signed the Oslo Accords with Israel. This was an internationally recognized agreement to divide jurisdiction of the territory between Israel and the newly created Palestinian Authority. Under this agreement, Israelis have full jurisdiction to live and build on the designated 60% of the territory. Therefore, any building in this territory is completely legitimate under international law through the Oslo Agreement.

So there you have it, in all the possible stages of the legal argument:

Israel can’t be an occupier because it likely has superior title to the territory in the first place. Even if it had no title to the territory, the Fourth Geneva Convention can’t apply here. And even if it could apply here, Israel would be a legal occupier rather than an illegal one, since Israel hasn’t violated the provisions of the Fourth Geneva Convention (making the settlements legal rather than illegal). Lastly, even if Israel’s settlements were a violation of article 49 of the Fourth Geneva Convention, the Oslo Accords have given both Israel and the Palestinian Authority the right to live and build in their allotted jurisdictions.

**ABOUT THE AUTHOR**

Robert Stark received a B.A. in Political Science and was Editor in Chief of the Lander College Political Science Journal, where he researched and wrote at length on a number of topics including Israel related issues. He served in an elite counter terror combat unit in the Israel Defense Forces, and is currently earning his Juris Doctorate.